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WHO LET THE DOGS OUT: SHOULD A STADIUM OWNER BE HELD LIABLE FOR INJURIES SUSTAINED FROM A MASCOT'S ERRANT HOT DOG TOSS?

JOSHUA D. WINNEKER*, DAVID GARGONE** & SAM C. EHRLICH***

I. INTRODUCTION

Yes, you read that correctly. Imagine you are at a professional baseball game with your family, and you are enjoying the atmosphere and all that goes into the production of a Major League game. Now imagine that the team's mascot is running around and tossing items into the stands to help the fans further enjoy their experience; a relatively common occurrence in professional sports these days. You, unfortunately, do not get to enjoy this experience though because you get hit in the eye with a hot dog wrapped in tin foil as a result of the mascot's errant throw into the stands. This alleged hot dog "battery" then causes you to suffer a detached retina, loss of vision and a subsequent cataract requiring two surgeries to repair all of the damage. When you went to the stadium that day, would you have ever thought that this could happen to you? Getting hit with a foul ball or a bat would be a possibility, but a hot dog? Most likely not.

Although this does not seem real, this is exactly what happened to John Coomer, who is currently embroiled in a lawsuit against the Kansas City Royals for his eye injury sustained in September 2009, when the Royals' mascot, Sluggerrr, hit Coomer with a "behind the back" hot dog toss. Coomer's case is pending in the Missouri Supreme Court after he lost at the trial court, but subsequently won at the Missouri Court of Appeals. This impending decision, while on its face seems trivial because of the nature of the object causing the harm, can actually have widespread implications pertaining to spectator liability at baseball games. In many jurisdictions, baseball stadium owners have been protected from spectator lawsuits by a combination of the "baseball limited duty rule" and the fans' assumption of risk.¹ Here, the question is whether the mascot's antics of throwing promotional items into the stands are considered to be

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1. See *generally* Turner v. Mandalay Sports Entm't, LLC, 180 P.3d 1172 (Nev. 2008).

inherent and essential to the game of baseball itself such that a fan assumes the associated risk of their harm. If so, the stadium owners will continue to be protected from liability and the injured spectators will be without recourse. But the Missouri Court of Appeals refused to give the Royals this protection by ruling that Sluggerrr's hot dog toss was not an obvious and known risk associated with attending a baseball game.

This article argues that the Missouri Supreme Court should affirm this decision because while mascot activities during a game are customary at most professional ball parks, it does not rise to the level of an obvious and known risk that is inherent to the sport of baseball itself. Thus, the Court should put stadium owners throughout the country on notice that they must closely monitor or alter the currently condoned practices of their mascots or else face potential liability.

Part I of this article will discuss the development of baseball's limited duty rule and the assumption of risk doctrine. Part II will address mascot antics at baseball games. Part III will analyze Coomer's case currently pending before the Missouri Supreme Court and Part IV will provide reasoning for how the Missouri Supreme Court should rule.

II. BASEBALL'S LIMITED DUTY RULE AND THE ASSUMPTION OF RISK DEFENSE

Being injured by a flying object while attending a baseball game is not a novel concept. Fans have been hurt by foul balls or pieces of a bat (or the whole bat) for years, and stadium owners have been consistently forced to defend these types of lawsuits.² These lawsuits have all been grounded in tort law under a negligence theory.³ The injured spectator would argue that the stadium owner failed to exercise reasonable care in protecting the safety of the patrons at the event, and that the lack of care resulted in the patron being harmed.⁴

From very early on, courts found it unfair to hold a stadium owner liable for an injury that was simply a known part of the game and part of the fan experience.⁵ Almost ninety years ago, coinci-

2. See, e.g., *Crane v. Kansas City Baseball & Exhibition Co.*, 153 S.W. 1076 (Mo. Ct. App. 1913); *Edling v. Kansas City Baseball & Exhibition Co.*, 168 S.W. 908 (Mo. Ct. App. 1914).

3. See *Crane*, 153 S.W. at 1076; see also *Edling*, 168 S.W. at 908.

4. See *Crane*, 153 S.W. at 1076; see also *Edling*, 168 S.W. at 908.

5. See James C. Kozlowski, *Majority "Baseball Rule" Limits Spectator Liability*, PARKS & RECREATION MAG. (May 1, 2013), <http://www.parksandrecreation.org/>

dentally, Missouri led the way in creating protection for stadium owners against these types of lawsuits in a pair of seminal cases. In *Crane v. Kansas City Baseball & Exhibition Co.*, the plaintiff, injured by a foul ball, had purchased an unreserved grandstand seat, which in those days entitled him to a choice between sitting behind home plate in seats protected by netting, and sitting along the foul lines in the “unprotected” section of the grandstand.⁶ In the course of trial, both sides had agreed to a stipulated statement of facts that said: “Baseball is our national game, and the rules governing it and the manner in which it is played and the risks and dangers incident thereto are matters of common knowledge.”⁷

The court found this stipulation to be extremely important, stating that the plaintiff’s agreement with this statement “justif[ies] the conclusion that he was no novice at the game but was familiar with the risks and dangers incident in the situation of the spectator occupying a seat in the grand stand.”⁸ In ruling that the plaintiff assumed the risk of danger by choosing to sit in the unprotected area, the court stated that “the fact that the general public is invited to attend these games, that hard balls are thrown and batted with great force and swiftness, and that such balls often go in the direction of the spectators,” the duty of the stadium operators merely includes “providing seats protected by screening from wildly thrown or foul balls for the use of patrons who desired such protection.”⁹

Limitations to this rule were set forth a year later in *Edling v Kansas City Baseball & Exhibition Co.*, again in Missouri, when the plaintiff was struck by a foul ball while sitting behind the catchers’ box at a Kansas City Blues game in the old American Association.¹⁰ The Blues organization had put up chicken netting behind home plate to protect the grandstand seats in this area, but the netting had become worn and rotten over time, and large holes had developed in areas where foul balls were frequent.¹¹ The foul ball in question had passed through one of these holes, striking the plaintiff in the face and breaking his nose, causing an alleged \$3,500 in damages.¹²

2013/May/Majority-%E2%80%9CBaseball-Rule%E2%80%9D-Limits-Spectator-Liability/.

6. See *Crane*, 153 S.W. at 1077-78.

7. *Id.* at 1077-78.

8. *Id.*

9. *Id.*

10. See *Edling*, 168 S.W. at 909.

11. *Id.*

12. See *id.* (discussing Plaintiff’s injury and alleged damages).

Citing *Crane*, the court in *Edling* ruled that the stadium owner had met its duty by providing protection to the area of the grand stand “most exposed to the battery of foul balls,” which would give spectators implied assurance that these seats were reasonably protected.¹³ While the court stated that other than this protection, there was no duty of care to protect spectators from being hit by foul balls, a duty of care was breached by allowing the netting to become old and rotten.¹⁴

“Baseball’s limited duty rule,” as established in Missouri by *Crane* and *Edling*, has since spread to other states in various situations.¹⁵ In 1935, a fourteen-year-old girl was struck and injured by a foul ball while watching a game from an unprotected seat at Seals Stadium in San Francisco.¹⁶ Citing *Edling*, the California Supreme Court ruled that management is not required to protect spectators from injury by foul and thrown balls and is in fact obligated to provide screening for all seats since “many patrons prefer to sit where their view is not obscured by a screen.”¹⁷ Along these lines they ruled that the girl, a high school athlete who had attended the game alone, and stated at trial that she took the unscreened seat knowing that she would be in danger of being struck by a batted ball, had assumed the risk of injury and precluded recovery of damages.¹⁸

While the limited duty rule has generally been applied broadly in most game situations, the courts have declined to make it a blanket rule for everything that occurs in the grandstand. In *Cincinnati Baseball Club Co. v. Eno*, the plaintiff was struck by a thrown ball during batting practice in between the two games of a double header.¹⁹ While reversing a summary judgment ruling in favor of

13. See *id.* at 331-32 (noting Defendant recognized duty to protect patrons from foul balls by screening portion of grandstand, and thus impliedly assured reasonable protection to patrons seated behind screen) (citing *Crane*, 153 S.W at 1077 (“[D]uty of defendants towards their patrons included that of providing seats protected by screening from wildly thrown or foul balls for the use of patrons who desired such protection.”)).

14. See *id.* at 332 (noting duty of reasonable care to ensure screen was free of defects).

15. See, e.g. *Bellezzo v. State*, 851 P.2d 847 (Ariz. Ct. App. 1992) (applying limited duty rule to spectators who had received complementary tickets).

16. See *Quinn v. Recreation Park Ass’n*, 46 P.2d 144, 145 (Cal. 1935) (discussing facts and procedural history of case).

17. See *id.* at 146 (noting management required to exercise ordinary care to protect patrons from “batted or thrown balls”).

18. See *id.* at 147 (noting accepting unscreened seat “even temporarily” with knowledge of danger constituted assumption of risk of injury).

19. See *Cincinnati Baseball Club Co. v. Eno*, 147 N.E. 86, 88 (Ohio 1925) (discussing facts of case).

the club, the Supreme Court of Ohio said that the early cases establishing the limited duty rule were based “upon the proposition that the plaintiff had such knowledge of the dangers incident to the game itself that she ‘assumed the risk’ or was guilty of negligence as a matter of law in sitting in an unscreened seat at the game.”²⁰ While holding up *Crane* as relevant and important law, the court ruled that since the specific circumstances created by having numerous groups of players throwing balls around during an intermission period “differ so essentially” from these cases, a question of fact still existed as to whether the plaintiff was aware of the particular danger caused by the circumstances in question.²¹

Furthermore, in *Jones v. Three Rivers Management Corp.*, a fan was hit by a ball hit in batting practice as she was walking around the concourse on the stadium’s opening day.²² Differing from previous cases, the Supreme Court of Pennsylvania noted that “even in a ‘place of amusement’ not every risk is reasonably expected” and held that the limited duty rule was limited to injuries incurred “as a result of risks any baseball spectator must and will be held to anticipate.”²³ Under this notion, they ruled that baseball’s limited duty rule should only apply to risks which are “common, frequent and expected.”²⁴ This decision has been directly cited by the Third Circuit and appellate courts in other states.²⁵

Baseball’s limited duty rule has thus developed to allow stadium owners to provide protective seating in the areas of the stadium that are high risk and potentially dangerous to the fans.²⁶ Once the stadium owner has sufficiently fulfilled that duty, if a spectator is outside of the protected seating and is injured by a foul ball or bat flying into the stands, the stadium owner will not be held

20. See *id.* at 87 (discussing *Crane* decision).

21. See *id.* at 88-89 (distinguishing *Crane*, holding whether plaintiff was guilty of contributory negligence was question of fact).

22. See *Jones v. Three Rivers Mgmt. Corp.*, 394 A.2d 546, 547-48 (Pa. 1978) (discussing facts of case and describing architecture of stadium).

23. See *id.* at 550-51 (“Movies must be seen in a darkened room, roller coasters must accelerate and decelerate rapidly and players will bat balls into the grandstand.”).

24. See *id.* (explaining limited duty rule does not affect duty of “sports facilities to protect patrons from foreseeably dangerous conditions not inherent in the amusement activity”).

25. See, e.g., *Arce v. U-Pull-It Auto Parts, Inc.*, No. 06-5593, 2008 U.S. Dist. LEXIS 10202, at *32 (E.D. Pa. Feb. 11, 2008); *Teneyck v. Roller Hockey Colo.*, 10 P.3d 707, 708 (Colo. App. 2000); *Friend v. Nationwide Mut. Ins. Co.*, No. 02AP-135, 2002 Ohio App. LEXIS 7212, at *4 (Ohio Ct. App., Franklin County Dec. 31, 2002).

26. See Gil Fried & Robin Ammon Jr., *Baseball Spectators’ Assumption of Risk: Is It “Fair” or “Foul”?*, 13 MARQ. SPORTS L. REV. 39, 61 (2002).

liable because the stadium owner had fulfilled his or her limited duty to the patrons.²⁷ The court reasoned that the stadium owner exercised reasonable care to cut down on foreseeable potential injuries by providing protected seating, and if a patron leaves that seating, the patron then assumes the risk of injuries that are inherent in the sport of baseball.²⁸ Therefore, the stadium owner should not be held accountable for a risk of injury that the fan assumed prior to even attending the game.

The modern day limited duty rule is perhaps best exemplified in *Turner v. Mandalay Sports Entertainment LLC*, where Mrs. Turner and her husband went to see the minor league Las Vegas 51's play at their local stadium.²⁹ While at the game, Mrs. Turner left her seat to buy an alcoholic beverage at one of the bars within the stadium.³⁰ As she was waiting for her drink, she was struck in the face

27. See *id.* (discussing details of limited duty rule).

28. For example, in *Costa v. Boston Red Sox Baseball Club*, Jane Costa, accompanied by three other people, arrived during the fifth inning of a game at Fenway Park, the home stadium for the Boston Red Sox. See *Costa v. Boston Red Sox Baseball Club*, 809 N.E.2d 1090, 1100 (Mass. App. Ct. 2004). During the bottom half of the inning, a foul ball was hit in the direction of the group striking the plaintiff in the face, and causing severe and permanent injuries. The plaintiff then filed suit against the Red Sox. *Id.* at 1091. In prosecuting her case, the plaintiff brought in an expert witness, a professor of engineering, to illustrate the nearly impossible act of getting out of the way of the foul ball that struck her face. *Id.* According to the expert witness, when factoring the distance the plaintiff was seated from the home plate area and the speed of the foul ball, the plaintiff had less than 1.07 seconds to try and avoid being hit. *Id.* The plaintiff also claimed that she had no prior knowledge of the game of baseball, and assumed that all foul balls just rolled off to the side of the home plate area. *Id.* (discussing plaintiff's argument). Although the court felt that those circumstances made the incident a unique situation, the court found that a person of normal intelligence should still understand that the possible risk of getting hit by a foul ball. *Id.* at 1093 (discussing court's reasoning in reaching conclusion). Therefore, the court ruled in favor of the ball club by accepting the primary assumption of risk defense. *Id.* (holding assumption of risk bar to recovery for plaintiff). Furthermore, in *Tucker v. ADG, Inc.*, the plaintiff was injured during a home game for the Oklahoma Redhaws professional baseball team. See *Tucker v. ADG, Inc.*, 102 P.3d 660, 662 (Okla. 2004). There, the plaintiff was not seated in the stands but was seated in a luxury suite above home plate. *Id.* (discussing facts of case). During the course of the game, a foul ball was hit into the luxury suite area and struck the plaintiff in the face. *Id.* The plaintiff sued the stadium owner for negligence, but both the trial and appellate courts ruled in favor of the defendants. *Id.* at 663-64. (discussing holding of case). The courts ruled that although the plaintiff was not seated in the stands, the inherent risk of getting hit by a baseball is not eliminated because any spectator who chooses to watch a baseball game should understand the risk of getting hit by a foul ball. *Id.* at 669 (reciting court's reasoning in reaching its holding).

29. See generally *Turner v. Mandalay Sports Entm't, LLC*, 180 P.3d 1172, 1172 (Nev. 2008) (setting forth facts of case).

30. See *id.* at 1174 (discussing factual background concerning plaintiff's claim).

with a foul ball knocking her unconscious, breaking her nose, and causing facial lacerations.³¹ Mrs. Turner then sued the stadium owner, claiming that her injuries were the result of negligence.³² The trial court ruled in favor of the defendants and the Nevada Supreme Court subsequently agreed.³³ Specifically, the Nevada Supreme Court adopted baseball's limited duty rule for their state.³⁴

The court explained that as long as the stadium owner undertakes two necessary steps, then it will fulfill its limited duty to the patrons.³⁵ First, the stadium owner must provide a "sufficient amount of protected seating for those spectators who may be reasonably anticipated to desire protected seats on an ordinary occasion."³⁶ Next, the stadium owner must provide "protection for all spectators located in the most dangerous parts of the stadium," where there is a high risk of injury from foul balls and bats.³⁷ In the instant case, Mrs. Turner chose not to sit in protected seating, and instead went into the beer garden part of the stadium.³⁸ The court found that the beer garden was not a dangerous part of the stadium such that Mandalay had to provide protection there as well.³⁹ Therefore, the court held that Mandalay had fulfilled its limited duty to Mrs. Turner and the rest of the patrons, and thus, it cannot be subject to liability for a negligence claim caused by an errant foul ball.⁴⁰ The court explained that foul balls are a known risk when entering a baseball game and Mrs. Turner assumed that risk when she chose not to sit in protected seating.⁴¹

Currently, baseball's limited duty rule is viewed as the "majority rule" when courts face spectator injuries at baseball games and has

31. *See id.*

32. *See id.* (summarizing plaintiff's legal argument).

33. *See id.* (exploring procedural history of case as it stood before the court).

34. *See id.* at 1176 (deciding to adopt limited duty rule in particular context).

35. *See Turner*, 180 P.3d at 1175 ("[T]he 'limited duty rule' . . . places two important requirements on stadium owners and operators.").

36. *See id.* (internal quotation omitted).

37. *See id.*

38. *See id.* at 1176 (reciting facts of case).

39. *See id.* ("Here, the record establishes that foul balls occasionally fly into the Beer Garden, some parts of which have an obstructed view of the field. The risk of an occasional foul ball, however, does not amount to 'an unduly high risk of injury.'").

40. *See id.* (stating that "the limited duty rule establishes the totality of the duty owed by baseball stadium owners and operators to protect spectators from foul balls within the confines of the stadium. Applying the rule to this case, we conclude that Mrs. Turner's negligence claim fails as a matter of law.").

41. *See Turner*, 180 P.3d at 1176 (stating that plaintiff's negligence claim fails because she choose "not to sit in a protected seating area").

been adopted in at least 16 states.⁴² Additionally, at least four states: New Jersey, Arizona, Colorado and Illinois have passed laws codifying the rule.⁴³ Finally, even as courts around the country have shifted from assumption of the risk to the more plaintiff-friendly comparative negligence standard, baseball's limited duty rule has survived without much effect.⁴⁴

III. MASCOT ANTICS

The key to the above cases is that any injury from fly balls and bats outside of the stadium owner's protected seating is a risk that is an obvious and known risk that was inherent to the game of baseball, thus precluding the spectators' lawsuits. But, as noted above, courts have been reluctant to protect stadium owners when the risk is not obvious or known to the spectator.⁴⁵ The question here is whether Sluggerrr's antics were inherent to baseball such that Coomer assumed the risk of being injured by the mascot. Other cases addressing mascot antics have ruled in favor of the spectator.

Specifically, the leading case on the antics of a mascot is *Low v. California League of Professional Baseball*, which held, as a matter of law, that the actions of a mascot are not inherent to the game of

42. Jake Simpson, *Idaho Court's Baseball Rule Balk Could Impact Other Sports*, LAW360 (Mar. 28, 2013, 6:53 PM), <http://www.law360.com/articles/427626/idaho-court-s-baseball-rule-balk-could-impact-other-sports>.

43. See N.J. STAT. §§ 2A:53A-43; 44; 45; 46; 47; 48 (2006); ARIZ. REV. STAT. § 12-554 (1999); COLO. REV. STAT. §13-21-120 (1994); 745 ILL. COMP. STAT. 38/10 (1992). The limited duty rule does however have its critics. Specifically, the Idaho Supreme Court recently declined to adopt the limited duty rule when a fan lost an eye after being struck by a foul ball during a minor league Boise Hawks' game in August 2008. See *Rountree v. Boise Baseball, LLC*, 296 P.3d 373 (Idaho 2013). The Court stated that there was no compelling public policy reason requiring them to adopt the limited duty rule because injuries to fans at baseball games was not a common problem in Idaho. *Id.* at 378 ("We find no compelling public policy requiring us to [adopt the Baseball Rule]"). Instead, the court allowed the injured fan to maintain a negligence action against the stadium owner. *Id.* at 380. The court noted that it was up to the state legislature to pass a limited duty rule for baseball stadium owners. *Id.* at 379. This case is a departure from the majority view and could likely be tied to the severity of the injury and not the actual negligence of the stadium owner. Additionally, the limited duty rule has been extended to hockey as well. See Kozlowski, *supra* note 5.

44. See Lynne Reaves, *Eye On the Ball: Injured Spectator Wins*, 69 A.B.A. J. 1616 (1983).

45. See *Jones*, 394 A.2d at 545. Similarly, in *Maytnier v. Rush* the court ruled that a plaintiff struck by a wild ball coming out of the bullpen would not be limited by the baseball rule since a spectator "does not assume the risk of being hit by a baseball he does not see, when more than one ball is being used, regardless of whether the game is in progress or not." See *Maytnier v. Rush*, 225 N.E.2d 83, 91 (Ill. App. Ct. 1967).

baseball.⁴⁶ In *Lowe*, the mascot (“Tremor” the dinosaur) hit a fan several times with its “tail” during a minor league baseball game, causing the spectator to be distracted from the game and unable to react to a foul ball, which subsequently hit the spectator in the face.⁴⁷ The fan sued the stadium owner and the stadium owner responded that it cannot be liable because it had satisfied its limited duty by providing adequate protective seating that the plaintiff failed to use.⁴⁸ The court ruled that while foul balls are an inherent risk at a baseball game and are essential to the game, the presence of the mascot is not inherent or essential to the game.⁴⁹ Specifically, the court stated:

Thus, foul balls represent an inherent risk to spectators attending baseball games. Under *Knight*, such risk is assumed. Can the same thing be said about the antics of the mascot? We think not. Actually, the declaration of Mark Monninger, the person who dressed up as Tremor, recounted that there were occasional games played when he was not there. In view of this testimony, as a matter of law, we hold that the antics of the mascot are not an essential or integral part of the playing of a baseball game. In short, the game can be played in the absence of such antics.⁵⁰

The court further stated that the mascot’s antics were a marketing tool and that “mascots are needed to make money . . . but are not essential to the baseball game”.⁵¹ While simply having a mascot in a stadium may be a “common phenomena”⁵² at a baseball game, it does not rise to the level of being inherent to the sport itself, such that the sport cannot go on without them. Without that aspect, a spectator cannot be expected to assume the risk of mascots’ antics.

Although the *Lowe* decision is a California appellate decision, it correctly acknowledged that a mascot’s presence and antics are not essential to the game of baseball and this decision should be extended by the Missouri Supreme Court.

46. See *Lowe v. California League of Prof'l. Baseball*, 65 Cal. Rptr. 2d 105, 111 (Cal. Ct. App. 1997).

47. See *id.* at 106.

48. See *id.*

49. See *id.* at 111.

50. *Id.*

51. *Id.* at 108.

52. *Harting v. Dayton Dragons*, 870 N.E.2d 766, 767 (Ohio Ct. App., Montgomery County 2007) (finding that San Diego Chicken mascot’s antics were “common phenomena”); *Gunther v. Charlotte Baseball*, 854 F. Supp. 424, 426 (D.S.C. 1994) (noting that baseball games “routinely involve” distractions, such as “giant team mascots”).

IV. COOMER V. KANSAS CITY ROYALS

A. Background and Trial Decision

On September 9, 2009, Coomer went to a Royals game with his father.⁵³ In order to get closer to the game, instead of sitting in their ticketed seats, Coomer and his father sat in empty seats six rows behind the third base dugout.⁵⁴ Between the third and fourth innings, the Royals conducted their “Hotdog Launch”.⁵⁵ This Hotdog Launch had been a mainstay at Royals games since 2000.⁵⁶ The Royals would throw out between 20-30 hotdogs either through an air gun or by hand.⁵⁷ The hotdogs shot through the air gun were wrapped in bubble wrap but the ones thrown by hand were in tin foil.⁵⁸ Sluggerrr, the mascot, would use different types of throws, including “behind the back” to entertain the fans.⁵⁹ On the day Coomer was injured, Sluggerrr was standing on the third base dugout launching the hot dogs and Coomer watched as he and his father were sitting directly behind the dugout.⁶⁰ Coomer admitted that he saw Sluggerrr make a motion with his arm behind his back but that he looked away for a split second to look at the scoreboard.⁶¹ While looking away, he felt something hit him in the face, knocking off his hat.⁶² Two days later, Coomer had a problem with his vision which turned out to be a detached retina that required surgery to repair.⁶³ Following the surgery, Coomer lost vision in his eye for three weeks, later developed a cataract in that same eye, and had another surgery to correct the cataract and place an artificial lens in his eye.⁶⁴

Coomer then filed suit against the Royals alleging that the Royals were negligent in failing to exercise reasonable care through its employee/agent, the mascot Sluggerrr.⁶⁵ The Royals responded

53. *Coomer v. Kan. City Royals Baseball Corp.*, 2013 Mo. App. LEXIS 46, at *2 (Mo. Ct. App. Jan. 15, 2013).

54. *See id.*

55. *See id.*

56. *See id.*

57. *See id.*

58. *See id.*

59. *See Coomer*, 2013 Mo. App. LEXIS 46, at *2.

60. *See id.* at *3.

61. *See id.*

62. *See id.*

63. *See id.* at *3-4.

64. *See id.*

65. *See Coomer*, 2013 Mo. App. LEXIS 46, at *1. Coomer also argued that the hot dog injury was a battery, but the court rejected this claim ruling that there was no intent to harm on Sluggerrr’s part. *See Reply to Plaintiff’s Suggestions in Oppo-*

that they fulfilled their limited duty and therefore the doctrine of assumption of risk applies as a defense to Coomer's negligence action.⁶⁶ The Royals argued that Sluggerrr's hot dog flinging antics were customary and had become a part of a Royals' game experience.⁶⁷ Coomer's case eventually made it to trial and the jury deliberated for one hour and returned a verdict in favor of the Royals.⁶⁸ Specifically, the jury found that Coomer himself was 100% liable for not being aware of his surroundings, which the jury believed actually caused the damages.⁶⁹ Coomer appealed the decision all the way up to the Missouri Supreme Court.

B. Missouri Court of Appeals Decision/Missouri Supreme Court

On appeal, Coomer argued that the trial court erred in submitting the assumption of risk defense to the jury because "the risks created by a mascot throwing promotional items do not arise from the inherent nature of a baseball game."⁷⁰ The Court of Appeals first noted that being hit by a baseball is a risk inherent to the game, but found that being hit in the face with a hot dog was not a "well-known incidental risk of attending a baseball game."⁷¹ Thus, the court ruled that the plaintiff could not have consented to and voluntarily assumed this risk simply by attending the game.⁷²

sition to Defendant's Motion for Summary Judgment at *5, *Coomer v. Kan. City Royals Baseball Corp.*, No. 1016-CV4073, 2011 WL 1397165 (Mo. Cir. Jan. 11, 2011) ("Defendant is also entitled to summary judgment on plaintiff's claim for battery as plaintiff has failed to plead the requisite level of intent and in any event impliedly consented to bodily contact associated with the Hotdog Toss.").

66. See Answer and Affirmative Defenses to Plaintiff's Petition at ¶ 3, *Coomer v. Kan. City Royals Baseball Corp.*, No. 1016-CV04073, 2011 WL 1397165 (Mo. Cir. Mar. 24, 2010) (providing affirmative defenses applicable to all counts and all allegations in plaintiff's petition). Prior to the trial, the man dressed as Sluggerrr who hit Coomer with the hot dog was relieved of his duties, a new person was hired, and that person was re-trained in a session led by the former Phillie Phanatic. See Kevin Underhill, *New Royals Mascot Reportedly Training to Avoid Further Hot-Dog Incidents*, LOWERING THE BAR (Feb. 26, 2010), <http://www.loweringthebar.net/2010/02/new-royals-mascot-reportedly-training-to-avoid-further-hotdog-incidents.html>.

67. See *Coomer*, 2013 Mo. App. LEXIS 46, at *9 (explaining Royals' attempt to portray hot dog launching as customary practice at baseball games).

68. See *id.* at *4 (describing verdict given and percentage of fault assigned to each party).

69. See *id.* (describing percentage of fault jury allocated to Coomer).

70. See *id.* at *6 (arguing that hot dog throwing is not inherent part of baseball experience).

71. See *id.* at *9 (explaining how court reasoned being hit by a hot dog was not inherent or expected part of baseball as a whole despite being part of Royals' tradition).

72. See *id.* at *9-10 (describing how plaintiff could not assent to something he was unaware of).

The Royals disagreed and asserted that the Hotdog Launch was a customary activity at the games, and therefore, Coomer assumed this risk by coming to the game.⁷³ Specifically, the Royals asserted that since Coomer admitted to attending 175 baseball games at Royals Stadium and saw promotional items thrown at baseball games, he knew it was a part of the baseball/fan experience.⁷⁴ The Royals also explained that the Hotdog Launch was not a new activity as it had been in practice since 2000.⁷⁵

Although the Missouri Court of Appeals recognized that the Hotdog Launch was a customary activity at Royals games, it did not “equate to a patron’s consent to the risks of being hit by a promotional item.” The court believed that “inherent risks are those that inure in the nature of the sport itself” and represent dangers that are “known and appreciated,” are “perfectly obvious or fully comprehended” such that the plaintiff can intelligently acquiesce to the risk.⁷⁶

The Court of Appeals then reversed the trial court and remanded the case for further proceedings.⁷⁷ The Royals appealed the decision to the Missouri Supreme Court.⁷⁸ In September 2013, the Missouri Supreme Court heard oral arguments on this issue.⁷⁹ Specifically, the Missouri Supreme Court is deciding whether to extend baseball’s limited duty rule to include the negligent actions of the teams’ mascots.⁸⁰ If the Missouri Supreme Court rules in favor of Coomer, it will have widespread implications to all stadium owners throughout the country, and will likely force many owners to

73. See *Coomer*, 2013 Mo. App. 46, *9-10 (describing Royals’ argument that hot dog launching was integral and expected part of their games).

74. See *id.* (supporting assertion from Royals that Coomer was aware of hot dog launch).

75. See *id.* (explaining Royals’ argument that hot dog launch was normal part of game). The Royals asserted that the hot dog toss was “an integral part” of a Royals’ game because it had occurred at every one of the 800 home games the Royals played since 2000 and that the fans came to “love and respect it.” Underhill, *supra* note 66.

76. See *Coomer*, 2013 Mo. App. LEXIS 46, at *8 (describing courts’ rationale for what is normally understood to be part of baseball).

77. See *id.* at *16-17 (stating courts’ decision to remand case for further proceedings).

78. See *Coomer v. Kan. City Royals Baseball Corp.*, 2013 Mo. LEXIS 170 (Mo. Apr. 30, 2013).

79. See Bill Draper, *Fan Hurt by Hotdog Sues Royals*, ESPN.COM (Nov. 1, 2013, 4:21 PM), http://espn.go.com/mlb/story/_/id/9911944/fan-injured-hot-dog-thrown-mascot-suing-kansas-city-royals.

80. See Steve Silver, *The Baseball Rule: How Duties to Spectators Continue to Evolve*, LEGAL BLITZ (Nov. 13, 2013), <http://thelegalblitz.com/blog/2013/11/19/the-baseball-rule-how-duties-to-spectators-continue-to-evolve/>.

change their practices as it pertains to mascots and other term personnel that engage with fans during a game.

V. THE MISSOURI SUPREME COURT SHOULD UPHOLD THE COURT OF APPEALS

This case boils down to one question: are mascots' antics inherent in the game of baseball? The Missouri Court of Appeals believed that Sluggerrr's actions were "customary" at Royals' games, but not inherent to the sport of baseball. This is in-line with the *Lowe* decision in California. When considering the court's analysis of the facts of the case, the Missouri Court of Appeals is correct for several reasons.

First, although having mascots at baseball games providing entertainment to the fans is something that most fans would expect to see at a game, the mascots themselves are not needed in order to play the game. For example, three Major League Baseball franchises currently do not have official mascots that are used to promote the team or are present during baseball games, showing that while mascots can make a baseball game a more enjoyable experience, they are certainly not as inherent to the sport as a foul ball or home run.⁸¹ The New York Yankees, Los Angeles Dodgers, and Los Angeles Angels do not feel it necessary to use mascots for entertainment purposes, yet each team continues to play games every season. Thus, they are not essential to the sport, and their corresponding conduct would not be inherent to the game. With or without mascots, the game of baseball can still be played.

Second, not every team in the league has interactive mascots such that any fan can go to any game in the country and expect to see the same behavior from the various teams' mascots. This is in stark contradiction to the fact that every fan that attends any game in the country would expect to see foul balls and bats flying into the stands as a natural part of the game. Thus, in order for the court to find that the mascots' antics were inherent to the game, the court would have to determine a baseline of mascot antics that all of them follow in order for it to be an obvious and known part of the game. This would be impossible to do given that every mascot on every team engages in different activities.⁸²

81. See Ian Crouch, *Baseball's Worst Mascots*, NEW YORKER (Jan. 14, 2014), <http://www.newyorker.com/online/blogs/sportingscene/2014/01/why-is-baseball-so-bad-at-mascots.html> (using fact that three major league teams lack a mascot to show mascots are not needed in order to actually play a game).

82. See *List of Major League Baseball Mascots*, available at http://en.wikipedia.org/w/index.php?title=List_of_Major_League_Baseball_mascots&oldid=6023027

Third, the assumption of risk doctrine, in this case, is specific to the game of baseball, and does not specifically identify the professional level as its only level of application. The risk of foul balls or bats exiting the field of play is existent at all levels of baseball, not just the professional levels. The same cannot be said about the existence of mascots. They are most prevalent at professional baseball games, but not an inherent aspect of the game of baseball. Individuals attending baseball games at all levels become immediately aware of the risks associated with attending a baseball game. However, they may not be accustomed to the mascot antics or interactions they may encounter at a professional baseball game. It would be difficult for a first time spectator at a professional baseball game to understand the role of a mascot and not be distracted by their antics. Furthermore, each professional franchise's mascot is unique in its interactions with the crowd, thus leading to an even greater difficulty in establishing what actions are to be assumed as expected at a game.

Fourth, while it may seem unfair that this particular plaintiff was able to bring a lawsuit for an injury that was caused during an in-game activity that was customary to the Royals' games since 2000, and that he admitted to attending 175 Royals' games, this actually further proves the point that mascot antics are not inherent to baseball itself. A Hotdog launch in Kansas City may be customary, but unless every team in every city is doing the same routine as a part of being able to play the baseball game, it simply is not an inherent part of the sport.

06 (last visited May 6, 2014) (describing varying traditions and customs of different sports teams). Different teams have different philosophies on game presentation, since each stadium tries to do things a little bit differently in order to be unique around the league. For example, while many teams have mascots and/or cheer squads that use air guns and slingshots to toss souvenirs like t-shirts and plush baseballs into the stands, some teams do not follow this practice. The New York Yankees, for example, have not had a mascot at all since 1982 when they retired the short lived "Dandy." Mark Townsend, *A Look back at 'Dandy' – the forgotten Yankees Mascot*, YAHOO! SPORTS (Nov. 17, 2013), <http://sports.yahoo.com/blogs/mlb-big-league-stew/look-back-dandy-forgotten-yankees-mascot-183709893—mlb.html>. Occasionally a mascot will take fan interaction to extreme levels; the NBA Houston Rockets' mascot Clutch is known for smashing cakes in the faces of opposing fans every once in a while. See Chris Strauss, *Houston Rockies Mascot Destroys Lakers Fan with Cake to Face*, USA TODAY.COM (Jan. 9, 2013, 6:33 PM), <http://www.usatoday.com/story/gameon/2013/01/09/nba-rockets-mascot-cake-attack/1820181/>. The Phillie Phanatic has the distinction of being the "most-sued" mascot in professional sports, having been sued by fans at least four times in its tenure as the mascot for the Philadelphia Phillies, most recently in 2012 for allegedly picking up a fan out of a lounge chair in which she was seated and throwing her in a hotel pool. See Barry Leibowitz, *Phillie Phanatic Sued...Again*, CBS NEWS (June 13, 2012, 5:38 PM), available at <http://www.cbsnews.com/news/phillie-phanatic-suedagain/>.

V. CONCLUSION

Baseball is a game that is played not only by professionals, but also by children of all ages. Spectators of the game learn early on that on-field play can lead to a dangerous spectator environment off the field. The inherent risks of the game of baseball include baseballs exiting the field of play as foul balls, errant throws, or homeruns, and whole or fragmented baseball bats exiting the field when bats are broken or released during a batter's swing. The assumption of risk doctrine generally protects stadium operators from negligence when patrons are injured by these commonplace occurrences in a baseball game. Stadium operators using this same doctrine to justify the actions of mascots suggests that mascots are as inherent to the game of baseball as foul balls.

If mascots were inherent to the game of baseball, they would be part of the spectator experience at all levels of the game. There are few, if any, little league or high school baseball games with mascots entertaining the crowds. Two of the most historic professional baseball franchises in the history of the game do not even have mascots roaming their stands. If the New York Yankees and Los Angeles Dodgers do not view mascots as a vital part of the game of baseball, it is clear mascots are not an inherent risk of the game of baseball.

It is also difficult to identify which mascot actions would be deemed inherent to its act since each mascot entertains spectators with its own antics. One of Sluggerrr's specific antics is the Hotdog Launch at Kansas City Royals games. Other mascots may throw t-shirts, popcorn, hats, or other souvenirs to patrons at the ballpark. These actions may be part of a team's attempt to entertain the crowd, but are not required to enjoy a baseball game. This is not to suggest that all mascots are potential liabilities, but those that directly engage fans may be liable for their actions.

If the Missouri Supreme Court decides to rule in favor of the Royals, they will be creating a situation where mascots' antics would need to be determined on a case-by-case basis that is specific to each team in each league at all levels of professional baseball. This would be unruly in its application and defeats the purpose of determining that something is inherent to the sport itself.